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In the Supreme Court of the United States

MICHELLE K. LEE, UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND DIRECTOR, UNITED STATES AND TRADEMARK OFFICE,
Petitioner,

v.

SIMON SHIAO TAM,
Respondent.

On Writ of Certiorari to United States Court of Appeals for the Federal Circuit

BRIEF OF *AMICI CURIAE* NATIVE AMERICAN ORGANIZATIONS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici have a long history of involvement in cultural, economic, educational, health, policy, and social justice issues affecting the Native American nations and tribes, and their citizenry. As a result, they speak authoritatively about the harm caused by racially based "Indian" names and their belief that the "REDSKINS" marks are disparaging to all Native Americans, subjecting them to ridicule, contempt, and disrepute.

Although *amici* support the government in this case, they take a balanced approach to trademark law as a general matter. Several *amici* themselves own valuable trademarks, which some *amici* assert in litigation when infringed. *Amici* thus recognize the importance of robust trademark protection, but they nonetheless believe that the government may regulate disparaging marks.

Amicus National Congress of American Indians ("NCAI") was established in 1944 and is the oldest, largest, and most representative national intertribal organization. It represents over 250 tribes, nations, pueblos, and Alaska Native villages with a combined enrollment of over 1.2 million. NCAI promotes the enhanced quality of life of Native people and strives to educate the general public regarding Native people and their rights. NCAI represents its individual and tribal members on a variety of political, cultural,

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of *amicus* briefs have been filed with the Clerk's office.

and social policy issues. NCAI has historically opposed the use of a racially disparaging term as a mascot. NCAI has held this position since before its leaderhip met with the president of the Washington team in 1972, and it continues to stand in opposition to the term today.

Amicus the Cherokee Nation, with 345,193 enrolled citizens, is the largest federally recognized Indian tribe in the United States. Cherokee citizens reside within the Tribe's 14-county jurisdictional area in Northeastern Oklahoma and throughout the 50 states. The Cherokee Nation is committed to eradicating the use of disparaging Native American names and imagery and reducing their negative impact on all Native Americans, but particularly, on Indian children.

Amicus the Navajo Nation is the largest Indian nation by land holdings with over 17 million acres of largely contiguous land in New Mexico, Arizona, and Utah. The Nation is larger than ten of the states and is roughly the size of West Virginia and twice the size of Massachusetts. The Nation has over 300,000 enrolled citizens. The Nation is a sovereign with two ratified treaties with the United States, entered into in 1850 and 1868.

Amicus the Yocha Dehe Wintun Nation is a federally-recognized sovereign tribal government located in Northern California. Yocha Dehe has taken a lead role in the nationwide "Change the Mascot" campaign to combat racist trademarks offensive to and demeaning of Native American people. In 2014, Yocha Dehe paid to run the "Proud to Be" commercial during the NBA Finals, raising awareness about, and protesting, the racist name of the National Football League's Washington team. On a local level, the

Tribe has worked with local school districts to change disparaging names and mascots.

Amicus the Morning Star Institute, founded in 1984, is a national, nonprofit Indigenous rights organization based in Washington, D.C. and devoted to traditional and cultural advocacy, arts promotion, and research. It is governed by a national Board of Directors who are tribal, traditional, cultural rights, and arts leaders. It leads in the areas of Native Peoples' religious freedom and repatriation, protection of sacred lands and cultural property rights, and in campaigns to eliminate stereotyping of Native Peoples in popular culture. Through its Just Good Sports project, Morning Star assists schools, students, and families who are addressing race-based names and imagery in their local athletic programs.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici fully support the position advanced by the government in this case—including its arguments that Section 2(a) is not a restriction on speech rights at all, that trademark registration functions as a subsidy that the government may regulate, and that maintenance of trademark registration is government speech.

Amici, however, focus on an additional argument that independently supports the constitutionality of Section 2(a). Trademarks are necessarily instruments of commercial speech, and Section 2(a) is a permissible regulation of commercial speech.

I. Trademarks are inherently commercial in character. Trademarks exist solely in relationship to goods or services in commerce; indeed, the Lanham Act limits trademarks to those marks that have in

fact been or will be "used in commerce." 15 U.S.C. § 1051. And trademarks are enforceable only when another uses an infringing mark in commerce. 15 U.S.C. § 1114. Noncommercial uses, including uses that are expressive, do not infringe the trademark monopoly. 15 U.S.C. § 1115.

Because trademarks are inherently commercial, trademark regulation is premised on permissible government regulation of commercial speech. Indeed, the commercial speech doctrine *must* be the doctrinal underpinning of the trademark regime, as a trademark provides a monopoly over certain speech rights to the mark owner—the result of which is to suppress the speech rights of the public at large. Trademarks can function as instruments of speech-suppression precisely because they regulate commercial speech.

II. Section 2(a) satisfies the *Central Hudson* standards for regulation of commercial speech. The government has a significant interest in the orderly flow of commerce, which includes elimination of disparaging and racist barriers to commerce. The Civil Rights Act of 1964, for example, includes significant speech limitations that are supported by these governmental interests. Title VII restricts employment advertisements that indicate racial preferences. Likewise, the Fair Housing Act bars discrimination in real estate advertising. Section 2(a) advances the government's well-established interests in preventing racially disparaging trademarks in commerce.

Likewise, the government has a significant interest in privacy and social welfare. Trademarks are intractably tied to advertising, as the purpose of a mark is to provide recognition to consumers. The government has a longstanding interest in regulat-

ing such commercial speech for the privacy and welfare of the public.

Section 2(a), moreover, provides a "reasonable fit" between these interests and the regulatory scheme. It is applied on a case-by-case basis that assesses the effect a trademark will have on commerce. Additionally, Section 2(a) does not bar use of a trademark in the whole; instead, it merely withholds certain federal benefits. Finally, those regulated have near limitless alternative options that may be used to advertise products and services.

III. The longstanding use of derogatory Native American imagery confirms the governmental interests at stake. The adoption of racial names by sports teams is an especially pernicious form of derogatory trademark that warrants regulation. Abundant social science research demonstrates that the use of Native American words as sports mascots demean and dehumanize. They create harmful stereotypes. And these uses have outsized effects on Native American youth. For these reasons, Native American organizations have broadly condemned the use of such sports mascots—especially use of the slur "REDSKINS."

ARGUMENT

I. Section 2(a) Regulates Commercial Speech.

A. Trademarks are inherently commercial in character.

When a speaker uses a trademark, he or she is engaging in a form of speech. But it is, by definition, a particular and limited form of expression: it is speech that is commercial in character. In fact, trademarks are inherently a creature of commerce.

From their initial emergence to the present day, trademarks have served commercial purposes as source identifiers, mechanisms of quality assurance and accountability, and have aided in consumer choice. The Lanham Act defines trademarks in relation to commerce, stipulates that prospective registrants demonstrate a mark's use in commerce to qualify for registration, and confers exclusively commercial rights upon the mark-holder. Thus, the purpose of a trademark is to advance the economic interests of the mark-holder, reference a specific service or product, and serve to advertise, propose, or otherwise aid in commercial transactions—thereby constituting commercial speech.

Indeed, a trademark "grants one private entity the right to suppress others' commercial speech." Rebecca Tushnet, *The First Amendment Walks into a Bar: Trademark Registration and Free Speech*, Notre Dame L. Rev. (forthcoming 2016) (manuscript at 2) (on file with author). Because the very purpose of a trademark is to supply the mark-holder a lawful monopoly on *speech*—the effect of which is to stifle speech of third parties—the trademark system *must* be premised on a permissible regulation of commercial speech.

Judge Reyna observed in dissent that "[w]hatever standard of scrutiny protects" the content of a trademark, "that same standard must necessarily be overcome by the government's substantial interest in the orderly flow of commerce, or no trademark could issue." Pet. App. 113a. One treatise has likewise explained that "the Lanham Act is constitutional because it regulates only commercial speech, which is entitled to reduced protections under the First Amendment." Stephen Fishman, *Copy-*

right and the Public Domain § 12.02 (2016). See also David C. Hilliard et al., *Trademarks and Unfair Competition Deskbook* § 8.02 (2015) ("Commercial speech * * * includes trademarks").

Put differently, "if the expressive *content* of the mark precludes regulation, on what authority may the government grant Mr. Tam the exclusive right to use this mark in commerce?" Pet. App. 112a-113a (Reyna, J., dissenting). Since the purpose of a trademark is to limit the speech rights of the public at large, it follows that the trademark system rests on principles of commercial speech.

1. Throughout history, trademarks have served as instruments of commerce.

Historically, trademarks have served a variety of purposes—but those purposes have all been connected by the unifying thread of commerce. Trademarks serve the objectives of "denot[ing] a particular standard of quality embodied in the product or service, symboliz[ing] the good will of its owner, and represent[ing] an advertising investment;" "protect[ing] the public from confusion and deception[;] and mak[ing] it easier for consumers to choose the products and services they want." Anne Gilson LaLonde, Gilson on Trademarks § 1.03 (2016).

One of the oldest forms of trademark was the "production" mark, whereby medieval craftsmen labeled their products with an identifying personal mark such that defective products could be traced back to their producer. *Ibid.* The production mark served as an accountability mechanism, punishing producers of defective products and helping guilds maintain high standards of production and craftsmanship. *Ibid.* In addition, the production mark

identified goods that originated from craftsmen outside the guild, helping guilds exclude outsiders and protect their local monopolies. *Ibid.*

As American commerce grew less localized and less relationship-based, the function of trademarks expanded—now with a focus on quality assurance. *Ibid.* Merchants began to use trademarks on goods they did not personally produce, signifying that the associated goods met quality standards and carried the mark-holder's reputation behind them. *Ibid.*

This Court has long recognized the commercial nature of trademarks. In the nineteenth and early twentieth centuries, the Court consistently described the purpose of trademarks as identifying for consumers the "origin or ownership" of the product with which the mark was associated. See *Estate of P.D. Beckwith, Inc.* v. *Comm'r of Patents*, 252 U.S. 538, 543 (1920); *Hanover Star Milling Co.* v. *Metcalf*, 240 U.S. 403, 412 (1916); *Columbia Mill Co.* v. *Alcorn*, 150 U.S. 460, 463 (1893); *Manhattan Med. Co.* v. *Wood*, 108 U.S. 218, 223 (1883); *Amoskeag Mfg. Co.* v. *D. Trainer & Sons*, 101 U.S. 51, 54 (1879); *Del. & Hudson Canal Co.* v. *Clark*, 80 U.S. 311, 323 (1871). And since then, the Court has continued to acknowledge trademarks' intrinsically commercial character, noting their "strictly business" purpose. *Friedman* v. *Rogers*, 440 U.S. 1, 11 (1979). See also *S.F. Arts & Athletics, Inc.* v. *U.S. Olympic Comm.*, 483 U.S. 522, 535-536 (1987).

2. The Lanham Act defines and regulates trademarks solely as instruments of commerce.

The Lanham Act incorporates this commercial understanding of trademark, defining it in terms of

commercial use and purpose. The Act's definition specifies that a trademark must be used or intended to be used in commerce for the commercial functions of identifying, distinguishing, and indicating the source of the mark-holder's goods. 15 U.S.C. § 1127. Accordingly, registered trademarks exist for, and are defined by, their commercial use.

In particular, the Lanham Act ties trademark registration and renewal to the use of the mark in commerce. The Act stipulates that "[t]he owner of a trademark *used in commerce* may request registration of its trademark." 15 U.S.C. § 1051 (emphasis added). The Act also requires that a trademark application specify "the date of the applicant's first *use of the mark in commerce*, the *goods in connection with which the mark is used*," and that "the mark is *in use in commerce*." *Ibid.* (emphasis added). Finally, to renew a trademark, the owner must "state that the mark is *in use in commerce*," "set forth the *goods and services recited in the registration on or in connection with which the mark is in use in commerce*," and "be accompanied by [evidence] showing *current use of the mark in commerce* as may be required." 15 U.S.C. § 1058 (emphasis added). At each step in the registration process—whether to qualify for registration, to complete a trademark application, or to renew a trademark—the mark-holder must demonstrate the nexus between the trademark and commerce.

The Lanham Act's background and history confirms that its protections are directed at trademarks used for commercial purposes. In passing the Act, the Senate specified that the Act would serve "[t]o provide for the registration and protection of trademarks *used in commerce*." S. Rep. No. 79-1333, at 1

(1946) (emphasis added), *reprinted in* 1946 U.S.C.C.A.N. 1274. The Senate declared that two purposes motivated the enactment of the Lanham Act:

> One is to protect the public so it may be confident that, in purchasing a product bearing a particular trade-mark which it favorably knows, it will get the product which it asks for and wants to get. Secondly, where the owner of a trade-mark has spent energy, time, and money in presenting to the public the product, he is protected in his investment from its misappropriation by pirates and cheats.

Two Pesos, Inc. v. *Taco Cabana, Inc.*, 505 U.S. 763, 782 n.15 (1992) (Stevens, J., concurring) (quoting S. Rep. No. 79-1333, at 3). Each of these stated purposes is inextricably bound up with a commercial goal.

3. Noncommercial uses are not the proper subject of trademark.

On the other side of the coin, the noncommercial use of a trademarked word, symbol, or device is not protected by the Lanham Act. Congress carefully permitted the fair use of trademarks in descriptive, nominative, and expressive manners.

Trademark protections have force only in the commercial sphere, where they serve important but limited commerce-specific goals. The Lanham Act sets forth two potential trademark infringement offenses, each of which is inherently tied to commerce. Traditional infringement, where an unauthorized user uses another's mark in a misleading manner, is prohibited. 15 U.S.C. §§ 1114, 1125(a). Similarly, the Act allows commerce-bound claims for dilution,

where an unauthorized use may diminish the uniqueness of a famous mark. 15 U.S.C. § 1125(c). Both traditional infringement and dilution offenses exempt noncommercial uses from liability. 15 U.S.C. §§ 1114(3), 1125(c)(3).

Noncommercial uses, such as parody, commentary, and artistic expression, can be exempted because they present only slight risks of consumer confusion as to a good's source; they are "non-trademark use[s] of a mark." *New Kids on the Block* v. *News Am. Publ'g, Inc.*, 971 F.2d 302, 307 (9th Cir. 1992). They may create some confusion as to the political or social position of the mark-holder, but they are typically do not create "confusion as to source, sponsorship, or affiliation." *Radiance Found., Inc.* v. *NAACP*, 786 F.3d 316, 329 (4th Cir. 2015).

Even if noncommercial uses pose some threat of confusion, the public interest in free expression mitigates against application of trademark rights to noncommercial uses. Thus, the law provides for good-faith "fair use[s]" of a trademarked term or symbol to describe (*KP Permanent Make-Up, Inc.* v. *Lasting Impression I, Inc.*, 543 U.S. 111, 118 (2004)), or to identify the mark-holder's product for comparative purposes (*New Kids on the Block*, 971 F.2d at 307-308).

In other instances, a trademark may assume a meaning of its own, making it difficult for a member of the public to express themselves without reference to a trademarked term. See *Mattel, Inc.* v. *MCA Records, Inc.*, 296 F.3d 894, 900 (9th Cir. 2002). "Once imbued with such expressive value," trademarks may "transcend their [commercial] identifying purpose," "becom[ing] a word in our language and assum[ing] a role outside the bounds of trademark

law." *Ibid.* When a mark becomes genericized, it loses its secondary meaning and thus is generally no longer enforceable as a matter of trademark law.

For all of these reasons, trademarks have no effect as to noncommercial and expressive speech.

B. Trademarks are commercial speech.

Against this background, a speaker's use of a federally registered trademark involves a form of commercial speech. In fact, this Court already has said as much: in *Friedman*, the Court recognized that "[t]he use of trade names in connection with optometrical practice * * * is a form of commercial speech and nothing more." 440 U.S. at 11. The Court subsequently agreed in *San Francisco Arts & Athletics* that the SFAA's use of the term "Olympic" for its sporting event was commercial speech, such that limits on the speech imposed only "incidental restrictions on First Amendment freedoms." 483 U.S. at 536-537. And the point is confirmed by looking to the particulars of the Court's commercial speech inquiry.

The Court has set forth two principal tests for determining whether expression constitutes commercial speech. First, under the baseline definition, speech is commercial if it "does no more than propose a commercial transaction." *Harris* v. *Quinn*, 134 S. Ct. 2618, 2639 (2014) (citation omitted). Second, for expression that goes beyond this baseline definition, speech will nonetheless be deemed commercial in character where it (1) was an advertisement, (2) referenced a specific product, and (3) stemmed from economic motivations. *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67 (1983). While no single factor is dispositive, the combination of all three ren-

ders speech commercial even where it "contain[ed] discussions of important public issues." *Id.* at 67-68.

1. In all cases, trademarks are properly regulated as commercial speech.

Trademarks are inextricably connected to the commercial context and, under the governing tests, fall within the definition of commercial speech. The point is not novel. "[A] firm's trademark is perhaps the most important element of commercial speech which is communicated to customers, [and] [a]ll other elements of advertising revolve around, relate to, and are symbolized by the trademark." 6 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 31:139.25 (4th ed. 2016). Indeed, without a trademark to reliably associate a product with its source, sellers would be unable to accrue the benefits of advertising.

Trademarks, by definition, reference a specific service or product. They are, by definition, bound up in the economic interests of the mark-holder and, also by definition, confer purely commercial rights. And trademarks serve to advertise, propose, or otherwise aid in a commercial transaction. Or, as Judge Kozinski put it, "[w]hatever First Amendment rights you may have in calling the brew you make in your bathtub 'Pepsi' are easily outweighed by the buyers' interest in not being fooled into buying it." Alex Kozinski, *Trademarks Unplugged*, 68 N.Y.U. L. Rev. 960, 973 (1993). Given their historical and contemporary function as well as the Lanham Act's text, purpose, and application, trademarks are properly considered commercial speech.

This remains true even when a trademark is used by one engaged in what is typically viewed as

core First Amendment speech. Thus, "nonprofits and noncommercial speakers in the First Amendment sense such as the *New York Times* can own trademarks" because the Lanham Act only governs the "function of the trademark"—which is "to identify them as sources of goods or services in commerce." Tushnet, *supra*, at 23. This is because "the trademark function can be separated from the other communicative functions of a symbol," and "what is communicated by the trademark function * * * is the only thing trademark law regulates: this is who I am/this is my source." *Id.* at 15. At bottom, "denying trademark rights regulates *only* the commercial aspects of the speaker's message." *Ibid.*

Moreover, as Justice Brennan observed, "[t]rademark protection has been carefully confined to the realm of commercial speech by * * * important limitations in the Lanham Act." *S.F. Arts & Athletics*, 483 U.S. at 564 (Brennan, J., dissenting). The Act "limits the impact of trademarks on noncommercial speech [by way of] the rule that a trademark violation occurs only when an offending trademark is applied to *commercial* goods and services." *Id.* at 566. Thus, Congress "relied on the 'noncommercial use' exemption to allay First Amendment concerns," (*Mattel*, 296 F.3d at 906), "expressly incorporat[ing] the concept of 'commercial' speech from the 'commercial speech' doctrine" and seeking to avoid the extension of trademark restrictions to "'noncommercial' expression, as that term has been defined by the courts" (H.R. Rep. No. 104-374, at 4, 8 (1995)). Conscious of the First Amendment, Congress applied the Lanham Act only to commercial speech, immunizing noncommercial uses from trademark enforcement.

Case law in lower courts applying the Lanham Act has respected the balance that Congress struck between commercial interests and free expression. "Because overextension of Lanham Act restrictions * * * might intrude on First Amendment values," lower courts have adopted a balancing test for enforcing trademark protections against noncommercial uses. *Rogers* v. *Grimaldi*, 875 F.2d 994, 998 (2d Cir. 1989). This test generally "insulates from restriction [any mark] with at least minimal [expressive] relevance." *Id.* at 1000. An expressive use will be prohibited by the Lanham Act only if that use is "explicitly misleading as to source or content, or that [has] no [expressive] relevance at all." *Ibid.* Thus, the Lanham Act only excludes unauthorized commercial uses of a mark—*i.e.*, commercial speech.

2. *Alternatively, only trademarks whose commercial component is "inextricably intertwined" with an expressive component are noncommercial speech.*

If, contrary to our principal submission, trademarks embody any component of core First Amendment speech, the Court should extend that protection to only the limited subset of marks whose expressive aspect is "inextricably intertwined" with the commercial component. See *Riley* v. *Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988).

Even if some marks "have an expressive component, it would seem beyond debate that many do not." Pet. App. 89a (Dyk, J., dissenting). That is certainly "the case with respect to routine product identifiers." *Ibid.* When a manufacturer assigns an arbitrary or fanciful name to a commercial product—*e.g.*, "PEPSI" to a soda or "DOMINOS" to a pizza—the trademark acts in solely a commercial speech capaci-

ty. Such marks do not seek to "editorialize" or make "generalized observations" about social matters. *Friedman*, 440 U.S. at 11.

This rests on a "'common-sense' distinction" between marks that are expressive from those that are purely commercial. *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 455-456 (1978). Courts and the Trademark Trial and Appeal Board ("TTAB") are well-eqipped to make this determination; indeed, they often must distinguish between a commercial use of a mark and a noncommercial, expressive use. As we described, noncommercial use of a mark does not constitute infringement. 15 U.S.C. §§ 1114(3), 1125(c)(3). Likewise, courts regularly determine whether use of certain trademarked content is nonactionable as social commentary, artistic work, or parody. See, *e.g.*, *Radiance Found.*, 786 F.3d at 319 (holding use of NAACP mark in the title "NAACP: National Association for the Abortion of Colored People" did not infringe NAACP's trademark); *Mattel*, 296 F.3d at 907 (holding "Barbie Girl" song did not infringe Mattel's BARBIE trademark); *Smith* v. *Wal-Mart Stores, Inc.*, 537 F. Supp. 2d 1302, 1317 (N.D. Ga. 2008) (holding that t-shirts with various phrases, including "WAL-QAEDA," were parody of Wal-Mart's business tactics and impact on the United States).

Given that trademark law necessitates distinguishing between commercial and noncommercial use of the same content, these same considerations may properly govern the applicable First Amendment framework.

II. The Government's Regulation Of Disparaging Trademarks Satisfies *Central Hudson*.

If the Court agrees that trademarks are commercial speech, the remaining question here is whether a rule that precludes the registration of disparaging trademarks—in particular, those that incorporate racial slurs—is a permissible regulation of that commercial speech. Our submission is that this regulation is constitutionally supportable.

For a regulation of commercial speech to comport with the First Amendment, it must satisfy the four-prong test of *Central Hudson*, which asks: (1) whether the speech at issue "concern[s] lawful activity and [is not] misleading"; (2) whether "the asserted governmental interest is substantial"; (3) "whether the regulation directly advances the governmental interest asserted"; and (4) whether the regulation "is not more extensive than is necessary to serve that interest." *Cent. Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980).

A. Section 2(a) directly advances substantial governmental interests in limiting disparaging speech in commercial contexts.

The government satisfies the second prong of *Central Hudson* because its "asserted governmental interest[s]" in regulating disparaging trademarks are "substantial." 447 U.S. at 566. The government has two substantial interests underlying Section 2(a): (1) ensuring the orderly flow of commerce; and (2)

combatting discrimination in order to protect the privacy and welfare of its citizens.[2]

And Section 2(a) satisfies the third prong of *Central Hudson* because it "directly advances th[ose] governmental interest[s]." *Ibid.* This third prong "concerns the relationship between the harm that underlies the State's interest and the means identified by the State to advance that interest." *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 555 (2001). To satisfy this element of the test, the government must demonstrate: (1) "that the harms it recites are real," and (2) that "its restriction will in fact alleviate them to a material degree." *Ibid.* (quoting *Edenfield* v. *Fane*, 507 U.S. 761, 770-771 (1993)). Anecdotal, psychological, and historical evidence—as well as jurisprudential consensus and common sense—illustrate that the harms underlying the government's interests are real, and that Section 2(a) directly and materially combats those harms.

1. The orderly flow of commerce.

a. The government undoubtedly has a substantial interest in preventing disparagement in advertising to ensure the ordely free flow of commerce: disparaging trademarks "undermine[] commercial activity and the stability of the marketplace in much the same manner as discriminatory conduct." Pet. App. 117a (Reyna, J., dissenting). This Court has recognized in the context of public accommodations,

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[2] Some applications of Section 2(a) may also satisfy the first prong of *Central Hudson*, because disparaging trademarks may well involve "false, deceptive, or misleading sales techniques." *Bolger*, 463 U.S. at 69. For example, the team name "WASHINGTON REDSKINS" may deceive the public by implying a false relationship with or approval by Native people.

housing, and employment law that discriminatory conduct—including speech—disrupts commerce.

The Civil Rights Act of 1964 was intended to resolve "what the Congress found to be a national commercial problem of the first magnitude." *Katzenbach* v. *McClung*, 379 U.S. 294, 305 (1964). Under the public accommodations title of the Civil Rights Act of 1964, the speech of public-serving businesses and their employees is regulated to prevent disparagement of customers "on the ground of race, color, religion, or national origin." 42 U.S.C. § 2000a(a). In upholding the constitutionality of this statute, the Court acknowledged the overwhelming "evidence of the burdens that discrimination by race or color places upon interstate commerce." *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 252 (1964).

Other provisions of the civil rights act were similarly addressed to the "national commercial problem" of discriminatory conduct and speech. Title VII prohibits racially and sexually disparaging speech in the workplace to the extent such speech harasses the disparaged person, or creates a hostile work environment. See, *e.g.*, *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 787-788 (1998); *Harris* v. *Forklift Sys., Inc.*, 510 U.S. 17 (1993). Title VII also restricts employers from advertising employment opportunities in a manner "indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-3(b). Similarly, the Fair Housing Act prohibits both discrimination in the sale or rental of housing (42 U.S.C. § 3604(a)) and discrimination in the advertisement of housing (42 U.S.C. § 3604(c)).

The conclusion that the government has an interest in avoiding the disruption of commerce that would follow from the use of disparaging trademarks therefore is not "based on mere speculation," but rather follows from this Court's precedent. *Lorillard Tobacco*, 533 U.S. at 561 (quotations omitted). As such, this interest in ensuring efficient commerce is closely aligned with other substantial interests the Court has recognized in considering the regulation of commercial speech. See, *e.g.*, *Central Hudson*, 447 U.S. at 569 ("The State's concern that rates be fair and efficient represents a clear and substantial governmental interest."); *Ohralik*, 436 U.S. at 460 (noting that states have a "general interest in protecting consumers and regulating commercial transactions"). Therefore, this interest clearly satisfies the second prong of *Central Hudson*.

b. In addition to targeting the real harms of disparagement in advertising, the government advances its interest in a direct and material way through Section 2(a). By refusing to register disparaging trademarks, the government disincentivizes use of such marks in interstate commerce. Because Congress could reasonably conclude that commercial actors are more likely to choose marks for which the advantages of federal registration are available through Section 2(a), it is encouraging the selection of non-disparaging marks. When non-disparaging marks are selected over disparaging marks, disruption to the orderly flow of commerce is averted.

This effect satisfies the third prong of the *Central Hudson* test as presented in *Lorillard Tobacco Co.* In that case, the government argued that by regulating the outdoor advertising of smokeless tobacco and cigars near schools and playgrounds, it would reduce

the youth demand for these products. 533 U.S. at 556-561. The Court agreed, noting that it has previously "acknowledged the theory that product advertising stimulates demand for products, while suppressed advertising may have the opposite effect." *Id.* at 557. The same common-sense logic applies to trademarks and harmful stereotypes: disincentivizing harmful stereotypes in trademarks will suppress the use of these stereotypes in society and their concurrent harms to commerce.

2. Privacy and welfare.

a. Declining to register disparaging trademarks also advances a discrete but related interest: encouraging racial tolerance and protecting the privacy and welfare of individuals. The government unquestionably has a substantial interest in combatting racial discrimination and promoting racial tolerance. The Court has found this interest to be substantial in multiple contexts. In *Bob Jones University*, the Court upheld the government's denial of tax benefits to a religious university that engaged in racial discrimination, citing the government's "fundamental, overriding interest" in "denying public support to racial discrimination in education." *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 604 & n.29 (1983). See also *Grutter* v. *Bollinger*, 539 U.S. 306, 330 (2003) (recognizing a compelling interest in the "educational benefits" of diversity, including "cross-racial understanding, [which] helps to break down racial stereotypes" (internal quotation marks omitted)). This interest in racial tolerance is analogous to interests that have been deemed compelling for the purpose of strict scrutiny; necessarily, then, it qualifies as "substantial" for the purposes of *Central Hudson*.

Incorporated within this interest in combatting discrimination is the government's concern for the privacy and welfare of residents. These concerns are closely aligned with interests the Court has previously found to be substantial for the purposes of regulating commercial speech, such as those at stake in protecting the privacy and tranquility of residents from intrusions by advertising. See, *e.g.*, *Fla. Bar* v. *Went For It, Inc.*, 515 U.S. 618, 624-625 (1995); *Edenfield* v. *Fane*, 507 U.S. 761, 769 (1993); *Ohralik*, 436 U.S. at 461-462.

The Court has also recognized the broad prerogative of states to protect the welfare of their residents. See, *e.g.*, *Lorillard Tobacco*, 533 U.S. at 555 (protecting minors from harms of tobacco use); *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 485 (1995) (protecting welfare of citizens from "alcoholism and its attendant social costs"); *Bd. of Trs. of the State Univ. of N.Y.* v. *Fox*, 492 U.S. 469, 475 (1989) (protecting students from "commercial exploitation" and intrusions on "residential tranquility"); *Posadas de P.R. Assocs.* v. *Tourism Co. of P.R.*, 478 U.S. 328, 341 (1986) (protecting citizens from harms of "casino gambling"). The Court's acceptance of these analogous governmental interests in protecting the privacy and welfare of citizens demonstrates that the government's interests in this case are sufficiently "substantial" to satisfy *Central Hudson*.

That interest is very much at stake in this case: combatting discrimination and fostering tolerance seeks to prevent "concrete, nonspeculative harm[s]" within the meaning of *Central Hudson*. *Went For It*, 515 U.S. at 629. Psychological and sociological evidence demonstrate that disparagement in advertising is detrimental to the welfare of the disparaged

group. Disparagement demeans, dehumanizes, and undercuts the dignity of the targeted group; normalizes racial discrimination and ingrains racial stereotypes in American commerce and society; spreads misinformation about disparaged individuals; and damages their self-esteem and mental health.

For example, the use of racial epithets in the trademark context may induce members of the targeted group to conform with stereotypes, including stereotypes they do not consciously accept. This concept, called stereotype threat, is a heavily-researched phenomenon within psychology. Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 Am. Psychol. 613 (1997). Psychological studies have revealed a negative relationship between stereotype salience and academic outcomes for adolescent members of minority groups. Toni Schmader, Michael Johns & Chad Forbes, *An Integrated Process Model of Stereotype Threat Effects on Performance*, 115 Psychol. Rev. 336 (2008). Members of minority groups tend to internalize the stereotypes in which they have been steeped. Such stereotypes lessen minority youth's conceptions of self-efficacy, and, when primed, these stereotypes become a self-fulfilling prophecy.

Furthermore, the use of disparaging slurs in commercial advertising normalizes racial discrimination and ingrains racial stereotypes in American commerce and society at large. Racialized mascots reinforce stereotypes and set forth a simplistic, distorted version of that community and culture. See Robert Longwell-Grice & Hope Longwell-Grice, *Chiefs, Braves, and Tomahawks: The Use of American Indians as University Mascots*, 40 NASPA J. 1, 9 (2003); Justin W. Angle et al., *Activating Stereotypes*

with Brand Imagery: The Role of Viewer Political Identity, 26 J. Consumer Psychol. (forthcoming 2016).

Disparaging trademarks also serve a modeling function and send a message that it is acceptable to discriminate against the targeted group. Responding to societal pressures, many prejudiced people would otherwise suppress their prejudice and restrain themselves from acting, at least explicitly, in a discriminatory fashion that aligns with their biases. Christian S. Crandall & Amy Eshleman, *A Justification-Suppression Model of the Expression and Experience of Prejudice*, 129 Psychol. Bull. 414, 416-417, 421 (2003). Racially disparaging trademarks, however, communicate societal approval of discrimination against and disparagement of that group, therefore serving as "releasers" of that otherwise-suppressed prejudice. Thomas E. Ford et al., *Not All Groups Are Equal: Differential Vulnerability of Social Groups to the Prejudice-Releasing Effects of Disparagement Humor*, 17 Group Processes & Intergroup Rel. 178, 179 (2013). As such, racial epithets in trademarks fuel the verbal and physical harassment of the targeted group. These harms—including stereotype threat and normalizing the prejudice and harassment—are real and not speculative, as required by the third prong of *Central Hudson*.

b. Section 2(a) directly and materially addresses the government's anti-discrimination interest by the same means it advances the commerce-protective interest. By disincentivizing the use of disparaging trademarks, it will decrease the prevalence of negative stereotypes in commerce and, in turn, mitigate the various harms suffered by members of disparaged groups and citizens generally.

Furthermore, the government's decision not to register disparaging trademarks is itself directly addressing the harms caused by disparaging slurs in society. By taking a position against harmful stereotypes in disparaging trademarks, the government communicates its own support for the well-being and equality of all citizens. Communicating that the government opposes disparaging speech and supports the well-being of disparaged groups directly combats the harms to their dignity and self-esteem. Cf. *Brown* v. *Bd. of Educ.*, 347 U.S. 483, 494 (1954) (recognizing that "[t]he impact" of discrimination "is greater when it has the sanction of the law"). In doing so, the government signals to others to oppose harmful stereotypes as well, decreasing their overall salience in society.

By materially disincentivizing the selection of disparaging mark and declining to support disparaging slurs, the government directly addresses the harms caused by disparaging stereotypes.

B. Section 2(a) is narrowly tailored.

Finally, the government's regulation of disparaging trademarks satisfies the remaining prong of *Central Hudson* because it is "not more extensive than is necessary." 447 U.S. at 566. This prong "requires a reasonable fit between the means and ends of the regulatory scheme." *Lorillard Tobacco*, 533 U.S. at 561. Ultimately, the structure of the regulation must support the inference that the government "'carefully calculat[ed] the costs and benefits associated with the burden on speech imposed' by the regulations." *Ibid.* (quoting *Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 417 (1993)). Section 2(a) satisfies this requirement because it is applied on a case-by-case basis, it constitutes a minimal burden on speech, and

the need for it is not outweighed by countervailing First Amendment concerns.

First, the denial of federal registration is not a complete ban on using disparaging trademarks in advertising. Rather, Section 2(a) requires case-specific determinations by the TTAB that a particular mark "may be disparaging to" "a substantial composite of the referenced group." *In re Geller*, 751 F.3d 1355, 1360-1361 (Fed. Cir. 2014) (quoting *In re Lebanese Arak Corp.*, 94 U.S.P.Q.2d 1215, 1217 (T.T.A.B. 2010)). There are not "numerous and obvious less-burdensome alternatives" that weigh against the conclusion that this regulation is narrowly tailored. *Went For It*, 515 U.S. at 633.

Second, Section 2(a) constitutes only a limited, indirect burden on the speech of trademark applicants. Failed applicants can still use their desired mark in commerce without federal registration. States remain free to grant trademark registration to these marks. Section 43(a) of the Lanham Act extends to trademarks that are not registered. Brief of Amicus Curiae International Trademark Association in Support of Neither Party at 10-15, *In re Tam*, 808 F.3d 1321 (Fed. Cir. 2015) (No. 14-1203). See also 15 U.S.C. § 1125(a). These "many alternative channels" left open by the regulation for applicants to use their desired trademark support the conclusion that the regulation properly fits the government's interest. *Went For It*, 515 U.S. at 634. Indeed, this Court in *Friedman* recognized the limited burden on the speaker worked by trademark regulations: "the restriction on the use of trade names has only the most incidental effect on the content of the commercial speech of" the applicant because all the commercial information that can be conveyed by one trade name

through association—identification of service, price, and quality—can be conveyed by another name, or through advertising. 440 U.S. at 15-16.

Third, the substantial government interest in regulating disparaging trademarks outweighs any countervailing First Amendment concerns. To a degree, this narrow tailoring prong of *Central Hudson* incorporates "an analysis of the countervailing First Amendment interests." *Lorillard Tobacco*, 533 U.S. at 564. A State need not "demonstrate that there is no incursion on legitimate speech interests, but a speech regulation cannot unduly impinge on the speaker's ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products." *Id.* at 565. As the Court recognized in *Friedman*, trademark regulation incidentally affects the ability to propose a transaction, and listeners can obtain the information through other means. 440 U.S. at 16. Therefore, the applicant's minor interest in being able to use a disparaging trademark with the imprimatur of the federal government is outweighed by the government's substantial interests in ensuring the orderly flow of commerce and protecting the privacy and welfare of citizens.

In conclusion, "[t]he restrictions of [Section 2(a)] are not broader than Congress reasonably could have determined to be necessary to further [its] interests." *S.F. Arts & Athletics*, 483 U.S. at 539. Section 2(a) is unlike "almost all of the restrictions disallowed under *Central Hudson's* fourth prong [that] have been substantially excessive, disregarding far less restrictive and more precise means." *Fox*, 492 U.S. at 479. Incorporating a case-by-case analysis for application, and imposing only a minor burden on applicant's

speech, the government's regulation of disparaging trademarks is sufficiently narrowly tailored to satisfy the final prong of *Central Hudson*. Therefore, Section 2(a) is a permissible regulation of commercial speech.

III. The Long History Of Trademarks That Disparage Native Americans Confirms That Section 2(a) Is Permissible Regulation.

It bears emphasis that the harms imposed by racially disparaging trademarks are not theoretical or academic; such trademarks cause real and concrete injury. The point is illustrated by examining, as an example, the injuries caused by the use of sports mascots employing racist Native American imagery. That is notably true of one particular racially disparaging trademark: the Washington, D.C. professional football team's use of the trademark "REDSKINS."

Pro-Football first registered the "REDSKINS" mark in 1967, and the Native American community mobilized against the slur's use in a series of publicized events almost immediately thereafter. In 1972, an attorney from *amicus* NCAI sent a letter to the team's president explaining that "Native American" sports imagery "perpetuates stereotypes in which American Indians are seen as participating in scalp taking, war-whooping, and expressing themselves in ungrammatical grunts, ughs and other tontoisms." Brief of Amici Curiae Native American Organizations in Support of Appellees at 21, *Pro-Football, Inc.* v. *Blackhorse*, No. 15-1874 (4th Cir. 2016). "[M]any of the 25 million Americans who watch televised professional football know nothing more about American Indians." *Ibid.*

Later that year, leaders of the Native American community and the team president met to discuss the disparaging mark, and "[a]t the meeting, each of the leaders of the various [Native American] organizations took turns explaining [their] united reason as to why the Washington football team's name should be changed, namely that [they] believe the name to be discriminatory, demeaning, and offensive." *Ibid.* While the team subsequently changed the cheerleaders' costumes to remove the faux Cherokee hair extensions and revised the fight song to remove offensive language like "Scalp 'em, swamp 'em — we will take 'em big score / Read 'em, weep 'em, touchdown! — we want heap more!", the disparaging team name remained. *Id.* at 22.

This use of "REDSKINS"—like other racially disparaging sports mascots—inflicts real injury. These mascots demean and dehumanize the target group; they foster misinformation and inappropriate stereotype; and they hinder development of self-esteem and other preconditions for social success.

First, the use of Native American words and images as sports mascots demeans and dehamunzes—thus entrenching racist attitudes.

To begin with, these mascots preclude society "from understanding the historical and current culture of indigenous people." Longwell-Grice, *supra*, at 9. This is because "[t]he wearing of feathers, buckskin, and war paint all lend themselves to an imagery that degrades Native Americans and their culture and distorts people's perceptions." *Ibid.* Likewise, "[t]he symbols mascots use—tomahawks, spears, war whoops, and headdresses—also are a stereotyped vision of Native Americans as savages." *Ibid.* In these representations, Native Americans are often charac-

terized as primitive, savage, and clownish, and as a people frozen in the past. Cornel D. Pewewardy, *Playing Indian at Halftime: The Controversy over American Indian Mascots, Logos, and Nicknames in School-Related Events*, 77 Clearing House 180, 182-183 (2004).

Because sports mascots are so socially pervasive, these team images "represent the default impression of [American Indian] people for most Americans." John Chaney et al., *Do American Indian Mascots = American Indian People? Examining Implicit Bias Towards American Indian People and American Indian Mascots*, 18 Am. Indian & Alaska Native Mental Health Res. 42, 43 (2011). As a result, "the boundary between *American Indian as human* and *American Indian as mascot* has become blurred in American culture." *Ibid.* The "invented images have become the majority culture's definition of what *being Indian means*." *Ibid.*

Empirical research thus demonstrates that use of Native American mascots entrenches racist attitutudes. The results of the Chaney study showed that, "[d]espite outward claims that [American Indian] mascots reflect honorable representations of [American Indian] people," the "data reveal that non-[American Indian] people tend to evaluate [American Indian] mascots more negatively than Caucasian mascots on an implicit level." *Id.* at 54. For these reasons, "it is difficult to defend the use of [American Indian] mascot images as truly positive, honorable representations of [American Indian] people." *Ibid.*

Second, racially disparaging team mascots spread harmful stereotypes.

"Stereotypes are particularly powerful when the target group * * * is unfamiliar." Stephanie A. Fryberg et al., *Of Warrior Chiefs and Indian Princesses: The Psychological Consequences of American Indian Mascots*, 30 Basic & Applied Soc. Psychol. 208, 209 (2008). And "most Americans have no direct, personal experience with American Indians." *Ibid.* This "relative invisibility * * * is, in part, the result of population size and segregated residential lving." *Ibid.* The consequences are clear—"the views of most Americans about American Indians are formed and fostered by *indirectly* acquired information"—mainly "media representations of American Indians." *Ibid.* For a large number of people, Native Americans may be principally defined by and socially represented in terms of mascot stereotypes.

This is a loss both to Native Americans and to the public as a whole. Native Americans suffer from the ensuing stereotyping, as native sports mascots ply on "[h]armful and negative stereotypes." Nat'l Congress Am. Indians, *Ending the Legacy of Racism in Sports & the Era of Harmful "Indian" Sports Mascots* 5 (2013) ("*Racism in Sports*"). The "'savage' and 'clownish' caricatures used by sports teams with 'Indian' mascots contribute to the 'savage' image of Native peoples and the myth that Native peoples are an ethic group 'frozen in history.'" *Ibid.*

Studies refute the contention from "pro-mascot advocates" who "suggest that American Indian mascots are complimentary and honoroific and should enhance well-being." Fryberg et al., *supra*, at 216. The reason that mascots demean may not stem from an "inherently negative" representation—it is "because, in the contexts in which they appear, there are relatively few alternate characterizations of

American Indians." *Ibid.* Thus, the mascots necessarily communicate stereotypes "to natives and nonnatives alike" as to "how American Indians should look and behave." *Ibid.*

As a result, "rather than honoring Native peoples, these caricatures and stereotypes contribute to a disregard for the personhood of Native peoples." *Racism in Sports*, *supra*, at 5. In sum, studies reveal "that non-[American Indian] people do not perceive a distinct difference between [American Indian] mascot imagery and actual [American Indian] people—they perceive them in a negative light and as essentially interchangeable." Chaney et al., *supra*, at 57.

The public, likewise, loses out on important educational experiences and historical and cultural context. Erik Stegman & Victoria Phillips, *Missing the Point: The Real Impact of Native Mascots and Team Names on American Indian and Alaska Native Youth*, Ctr. for Am. Progress 4 (2014). Stereotypic representations paint Native Americans as a static image, with an outdated and caricatured presentation that makes the non-native public feel like Native Americans are far removed from their own way of life. Pewewardy, *supra*, at 182.

Third, the use of racist Native sports mascots inflicts especially profound injuries on youth.

The "negative images, symbols, and behaviors" associated with Native American sports mascots "play a crucial role in distorting and warping American Indian children's cultural perceptions of themselves." *Id.* at 181. When exposed to these mascots, "the self-esteem of Native youth is harmfully impacted, their self-confidence erodes, and their sense of

identity is severely damaged." *Racism in Sports*, *supra*, at 5.

These implications are real. Children "develop racial awareness at an early age, perhaps as early as three or four years old." Pewewardy, *supra*, at 182. When Native American children "constantly see themselves being stereotyped and their cultures belittled," they develop "low self-esteem and feel shame about their cultural identity." *Ibid.* As Native American children grow up surrounded by degrading representations and the trivialization of their culture, they may internalize a feeling of inferiority and comport themselves outwardly in accord with that feeling—that is, they may "grow into adults who feel and act inferior to other people." *Ibid.*

The Fryberg study, published in 2008, identifies how "[e]xposure to American Indian mascot images has a negative impact on American Indian high school and college students' feelings of personal and community worth." Fryberg et al., *supra*, at 215-216. This restricts their "achievement-related possible selves." *Id.* at 216. In short, the stereotypes embodied by sports mascots "affect how Native youth view the world and their place in society." *Racism in Sports*, *supra*, at 5. In the aggregate, these individual harms can produce adverse academic and psychological outcomes. Jamie Jaramillo et al., *Ethnic Identity, Stereotype Threat, and Perceived Discrimination Among Native American Adolescents*, J. Res. on Adolescence 1 (2015).

This impact on Native youth is particuly odious insofar as this group exhibits high rates of depression and suicidal ideation, outpacing that of other racial groups within the country. *Ibid.* Suicide is the second leading cause of death for Native American

youth aged 15-24, at a rate that exceeds the national average by 2.5 times. Stegman & Phillips, *supra*, at 7.

Sports mascots affect non-Native children, too. Through exposure to "stereotypes at early ages," individuals may "grow into adults who may unwittingly or unknowingly discriminate against American Indians." Pewewardy, *supra*, at 182. That is because, as children, they were "prevented from developing authentic, healthy attitudes about Indians." *Ibid.*

Given these real-world consequences, it is little surprise that a broad-spectrum of Native entities object to the use of Indian imagery in sports mascots, especially the term REDSKINS. For example, the elected legislative body of *amicus* the Navajo Nation has enacted a resolution stating that the term "Redskins" as used by Pro-Football "constitutes a disparaging epithet." Res. No. NABIAP-22-14, ¶ 2 (2014). The Naabik'íyáti Committee of the Navajo Nation Council, a "committee of the whole" made up of all Council Delegates (elected by and representative of all voting-eligible Navajo people), with the power to state the policy of the Navajo Nation on important public policy matters, unanimously passed a resolution clearly stating the official view of the Nation that:

> The Navajo Nation * * * opposes the use of the terms "redskin" and "redskins," and other disparaging epithets and references to Native Americans in professional sports franchises.

Id. ¶ 10.

Likewise, in 1993, *amicus* NCAI adopted two resolutions to stop the use of the racial slur "REDSKINS" as a team name. One of these resolutions

was adopted by the Executive Council during its meeting of January 18-19 and stated in part:

> [T]he term REDSK[*]NS is not and has never been one of honor or respect, but instead, it has always been and continues to be a pejorative, derogatory, denigrating, offensive, scandalous, contemptuous, disreputable, disparaging and racist designation * * * and continues to be * * * damaging to Native Americans.

Brief of Amici Curiae Native American Organizations in Support of Appellees at 24, *Blackhorse*, No. 15-1874 (4th Cir. 2016).

In light of the clear evidence that Native American mascots inflict significant social harm, it is perhaps little surprise that teams across the country have abandoned "Indian" references in sports mascots. Over the past 35 years, about two-thirds of teams that use such mascots—about 2,000 teams—have eliminated these references. *Racism in Sports*, *supra*, at 8. In particular, 28 high schools have ceased using the name "REDSKINS." *Ibid.*

The government has enormous, legitimate interests in regulating trademarks that ply on such racist imagery.

CONCLUSION

The judgment of the court of appeals should be reversed on commercial speech grounds.

Respectfully submitted.

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